Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

O. BRUTON SMITH AND HELEN W. SMITH, EXECUTRIX FOR PLAINTIFF BILL SMITH, DECEASED

PETITIONERS

v.

THE UNITED STATES

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court of Federal Claims' irregular use of a Show Cause Order and Opinion to exclude *sua sponte* Petitioners' relevant affidavits, depositions and other evidence, for the purpose of granting summary judgment for Respondent on the contract issue, and summary affirmance by the Court of Appeals are in conflict with this Court's rule that "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in its favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2513 (1986); Matsushita Elec. Indus. Co. v. Anos Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 1356 (1986); United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993, 994 (1962).

Whether, given the trial court's finding that there was no contract as contended by Petitioners, the Fifth Amendment was then violated by the lower courts' refusal to recognize property rights created by the rule of promissory estoppel, contra to the recognition of that rule by other federal courts of appeal, as being the subject of a Fifth Amendment taking without just compensation.

CORPORATE DISCLOSURE STATEMENT

The real parties in interest are O. Bruton Smith, and Helen W. Smith, Executrix of the Estate of Bill Smith, deceased, individually and North Carolina Federal Savings and Loan Association (Old NCF), a defunct corporation, represented derivatively by the individual Petitioners. NCF Financial Corporation, which acquired all of the stock of New NCF in 1988 as a holding company, a defunct corporation, is also represented derivatively.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

OPINIONS BELOW

The opinion, order and judgment of the United States Court of Federal Claims App.A2-A33 are reported at 58 Fed. Cl. 374 (2003), 2003 U.S. Claims LEXIS 301 (2003).

The decision of the Court of Appeals for the Federal Circuit is reported at *Smith v. United States*, 110 Fed. Appx. 898, 2004 U.S. App. LEXIS 22024 (2004), and the Court's Order denying rehearing is reported at *Smith v. United States*, 2004 U.S. App. LEXIS 2754 (Fed. Cir. Dec. 14, 2004)

JURISDICTION

Jurisdiction of the Court of Federal Claims was invoked under 28 U.S.C. § 1491 and the Fifth Amendment of the United States Constitution. The Court of Federal Claims opinion was entered October 22, 2003. The Court's Judgment granting the United States summary judgment on all claims for breach of Petitioners' contract with the United States and the taking of Petitioners' property without just compensation was entered October 23, 2003. Notice of Appeal was duly filed December 3, 2003. App.A41. Jurisdiction of the Court of Appeals for the Federal

Circuit was invoked under 28 U.S.C. § 1295 (a)(3). The appeal was docketed in the Court of Appeals for the Federal Circuit on January 23, 2004 as number 04-5046. The Court of Federal Appeals entered judgment under its Rule 36, summarily affirming the court below on October 6, 2004. App.A42-A43. Petitioners timely filed a petition for re-hearing on the 18th day of November, 2004. The Court of Appeals denied re-hearing December 14, 2004. App., A37-A40. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

Amendment V of the Constitution provides:

"No person shall...be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Court of Federal Claims Rule 56 provides:

> (c) The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
> (d) If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or the

> relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Court of Federal Claims Rule 17 (a)(b) provides:

(a) Real Party Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same efec as if the action had been commenced in the name of the real party in interest.

(b) Capacity to Sue or be Sued. the capacity of an individual, other than one acting in a representative capacity, to sue or sued shall be determined by the law of the individual's domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the applicable state, except (1) that a partnership or other unincorporated association which has no capacity by the law of its state may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C., Sections 754 and 959(a).

STATEMENT

1. The Underlying Facts.

A. Claims for breach of contract.

Petitioners as Plaintiffs filed this "*Winstar*-related" case in 1992. It involves Congress' passage of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") and the Act's repudiation of the government's contractual supervisory goodwill forbearance determined by the GAAP "Purchase Method" in the amount of approximately $15,000,000, amortizable for 40 years. This contractual forbearance was the consideration for rescue of the failing Carolina Federal Savings and Loan Association by Petitioners and other shareholders of Old NCF. Petitioners, as Plaintiffs below, sought restitution for material breach and repudiation of their contract with the Federal Home Loan Bank Board ("FHLBB"). The *quid pro quo* for FHLBB's goodwill forbearance was the contribution of all the assets of Old NCF to CFS and the acquisition of all shares of the failing CFS by Petitioners and the other shareholders of Old NCF. The CFS shares thus acquired would have been worthless without the contractual goodwill forbearance. This agreement remained in place from June 1982 until repudiated by the passage of FIRREA in 1989. If the forbearance had not been contractual by the government, and could have been withdrawn a short time after acquisition of CFS by Petitioners and the other shareholders of Old NCF, CFS would have been rendered in non-compliance with regulatory capital requirements to the extent of about $15,000,000, and its shares would have been worthless.

B. Derivative Claims.

Petitioners also asserted derivative claims for breach of contract as stockholders of Old NCF. Old NCF negotiated and was a party to the contract, and its charter was dissolved after transfer of its assets to CFS. No receiver was appointed for Old NCF. A receiver was appointed for CFS (New NCF) after FIRREA's repudiation of the goodwill forbearance contract. Petitioners do not here purport to exercise any right based simply upon ownership of CFS shares.

C. Takings Claims.

Alternatively, Petitioners alleged claims for the government's taking without compensation of Petitioners' property and rights arising by promissory estoppel and justifiable reliance upon inducement by FHLBB. The Old NCF stockholders, including Petitioners, materially and detrimentally changed their position in reliance upon FHLBB's offer when they voted the acquisition of Old CFS' shares and dissolution of their own corporation, Old NCF, and contribution of all its assets to CFS.

D. The Contract.

The merger application, approved by Petitioners by vote and FHLBB by Resolution 82-391, included affidavits which affirmed:

> . . . 4. Carolina Federal will not furnish any consideration associated with the purchase . . .of its stock. . . . 9. The fair market value of the Carolina Federal capital stock to be received by each shareholder of North Carolina Federal who does not perfect his dissenters' rights will be approximately equal to the fair market value of the North Carolina Federal capital stock in exchange therefor. . . . 11. North Carolina Federal, Carolina Federal and their shareholders will each pay their own expenses, if any, incurred in the proposed transaction; and The basis of the Carolina Federal stock to be received by the shareholders of North Carolina Federal will, in each instance, be the same as the basis of the respective shares of North Carolina Federal stock. App.A55-A57.

CFS had a negative asset balance of about $15,000,000, and Old NCF had a positive asset balance of about $15,000,000. Without the agreement for a supervisory goodwill forbearance of about $15 million amortizable for 40 years, these official affidavits would have been specious to the knowledge of FHLBB and Petitioners. This disaster for FHLBB's plans was avoided in that the proxy statement,

included in the Application and given to Petitioners as ordered by FHLBB, provided the negotiated terms of the offered agreement in stipulating:

> [T]he merger will be accounted for as a 'purchase...the identifiable intangible assets, which approximate $837,000 will be amortized by charges to operations over a period of 6-25 years on accelerated and straight lines. The unidentifiable intangible asset, which approximates $14,012,000 assuming the merger had occurred on March 31, 1982, will be amortized by charges to operations over a period of 40 years using the straight line method of amortization. App.A48.

FHLBB Resolution No. 82-391 (App.A50-A51) required that all conditions be completed one condition was that these stipulations be communicated to the shareholders for approval and assent by vote. The shareholders of Old NCF, including Petitioners, assented, approved, and performed all stipulated conditions necessary to complete the "merger."

2. The Federal Claims Court Proceedings.

The Show Cause Order ("Order Addressing all Pending Motions") entered *sua sponte* by the trial court on February 25, 2003 directed Petitioners to file a "Joint Appendix" composed of "transactional documents," thus excluding depositions, affidavits, related letters, memoranda, documents and orders of federal regulators evidencing Petitioners' contract for the stipulated goodwill, and to show cause in ten pages based only on "transactional documents" why the government's motion for summary judgment should not be granted. Petitioners filed their "Ten Page Response," and the Joint Appendix, on July 31, 2003. Petitioners' Response reserved the right to rely upon any other relevant and material evidence not included in the order. Thereupon and without a hearing or oral argument on the government's motion for summary judgment, the trial court entered the Opinion and Order of October 22, 2003 and Judgment of October 23, 2003 granting summary judgment dismissing Petitioners for lack of standing. The

dismissal was based in important part upon the Opinions' finding that Petitioners were not signatories to the goodwill contract.

A. Relevant evidence excluded from consideration by the Show Cause Order and the Opinion included:

(1) Petitioner O. Bruton Smith testified on his discovery deposition, October 28, 1999, as follows:

> Q. You just told me about 40 years. Can you tell me what Mr. Goodwin [President of Old NCF] and the person from Peat Marwick [Old NCF's accountants] told you about goodwill itself?
>
> A. That we could write all the loans down to market, create the goodwill whether it be 20 million or 30 million or whatever it was and then we write – and then the goodwill is created and then you write that off over a 40-year period. [Emphasis added.]

(2) Paragraph 8 of the Affidavit of O. Bruton Smith, March 8, 1998, states an obvious truth: "[T]o do the acquisition of Carolina Federal and the merger without the stipulated supervisory goodwill forbearance would have had a disastrous effect upon the adequacy of regulatory capital and would have destroyed the value of their [the shareholders'] stock." App.A54.

(3) Plaintiff Bill Smith testified in his *de bene esse* deposition that:

> A. . . .If it hadn't been for the $14 million and the 40 years I would have never voted for the merger.
>
> Q. You relied upon the $14 million and 40 years amortization
>
> A. Yeah, that's right. App.A66.

(4) Bill Smith Deposition 14:4-24:

> Q. And what do you mean, blue sky?
>
> A. Well, the $14 million they was going to give us, and he called it creative financing, they were going to give us to take over that savings and loan, to take that troubled institution and the amortized goodwill over 40 years, you know. App.A63.

(5) Bill Smith further testified in his discovery deposition 99:9-19, 100:21-22: "That's a contract as far as I'm concerned." App.60

(6) Petitioners expert value witness, Bryan H. Jones, testified on his discovery deposition that all stock in Old NCF, as a going business (prior to the merger) had a total fair market value of $22,300,150. Deposition of Bryan H. Jones, Vol. I, P162. App.A81.

(7) FHLBB Chairman Richard T. Pratt (1981-82) testified at App.A71-A78.:

"If interest rates in '82 remain about where they are—and without factoring in industry restructuring—some 400 associations will exhaust their capital accounts. Continuation of these rates through 1983 would result in another 500 institutions in this condition." Common Deposition of Richard T. Pratt in *Plaintiffs in All Winstar-Related Cases v. United States*, No. 90-8C *et al.*, December 2, 1998, at 106:10-15. Liquidation of all insolvent thrifts in 1981 could not have been accomplished without "the bankruptcy of FSLIC." *Id.* at 29-30. The acquiring institutions that merged with failing thrifts were thus providing a "service to the FSLIC and the FHLBB and the service was indispensable." *Id.* at 99:11 – 100:7.

"FHLBB in unassisted supervisory mergers had whatever role they desired. So the senior staff and the Bank Board could have a major influence on an unassisted merger through a myriad of avenues." *Id.* at 100:8-21. "The Bank Board could have allowed and instructed the institution to use generally accepted accounting

principles, which would result in goodwill under the GAAP application." *Id.* 16:4-9. If the merger resulted in goodwill, it would be the expectation of the Bank Board that the merger partners could rely upon that goodwill for the amortization period specified. It was Chairman Pratt's opinion that they could. *Id.* at 16:10-17.

"Regulatory documents concerning the Old NCF merger chronicle one of those supervisory mergers which may indeed be relatively typical." *Id.* at 8:22- 9:1-3. The program created by Chairman Pratt and Mr. Beesley and others was successful and assisted in reducing the cost of resolution to the FSLIC funds. *Id.* at 80:14-17.

"Plaintiffs were not automatically entitled to GAAP accounting. GAAP was a change in the regulations made by FHLBB so that it could be used to induce supervisory acquisitions which were a new program of Chairman Pratt to promote the rescue of failing S&L's. GAAP could be **offered as part of a negotiated acquisition**. The acquiring institutions probably would have been reluctant to acquire the troubled institution without immediate benefit that was created by FHLBB." *Id.* at 43, line 21, to 44, line 3 (emphasis added). App.A75.

(8) The letter of David S. Goodson, Jr., Supervisory Agent, to H. Clark Goodwin, President, NCF, dated May 3, 1982, requires "[C]ancellation of North Carolina Federal Savings and Loan Association charter, certificate of insurance and certificate of membership in the Federal Home Loan Bank of Atlanta . . .," *i.e.*, Old NCF's stockholders acquired CFS' stock, and CFS acquired Old NCF's assets, not its charter. Cancellation of Charter also was required by April 23, 1982, Letter of Carl O. Kamp, Jr., Principal Supervisory Agent, to Clark Goodwin. App.A44-A46.

(9) The Agreement (of merger) in the Application dated December 29, 1981 in ¶ 2.3 stipulated the merger would become effective only when "(ii) **all conditions precedent** . . . **have been satisfied** and, (iii) the Bank Board shall declare the Merger effective. . . . NCF . . . shall prepare a . . . Proxy Statement . . . to . . . shareholders . . . ." (emphasis added). App.A80. Old NCF by its President (and shareholder) accepted by executing the Agreement in

the Application approved by FHLBB and accepted all FHLBB's terms subject to the express condition precedent of the stipulated "shareholder approvals to the merger." (Emphasis added). App.A79-A80. The shareholders of Old NCF accepted by performing all their "conditions precedent."

(10) Negotiations leading to contract are memorialized in FHLBB memos and correspondence. The Memo from Deputy Director FHLBB to Robert J. Moore and Harry M. Zimmerman, Associate General Counsel, dated May 20, 1982, states:

> OES's current position is that 40 years is considered unacceptable without a detailed analysis which supports the use of a 40 year amortization period. The association's independent accountant indicated that the association could justify the 40 year amortization period and that the supporting information would be forwarded immediately. App.A48-A49.

(11) The Memo of Robert J. Moore to Harry M. Zimmerman, Jr., FHLBB Associate General Counsel, dated May 26, 1982, states that based on "the additional information referred to in Peat, Marwick, Mitchell & Co.'s (PMM&Co.) letter dated May 20, 1982, and detailed discussions with Mr. Wallace Edge, PMM&Co. partner, we conclude that the proposed merger application is in substantial compliance with OES's SP-24 and Generally Accepted Accounting Principles." App.A49-A50.

(12) The Memo of Thomas P. Vartanian, FHLBB General Counsel, to J.J. Finn, FHLBB Secretary, April 26, 1982, used contract terminology in noting that "the **terms** of the proposed transactions are fair to the stockholders of their respective associations . . ." (emphasis added). App.A50-A51. The "terms" of the transaction offered Old NCF stockholders would manifestly not have been "fair" to NCF or NCF's shareholders absent the contractual nature of the "terms" of the forbearance, *i.e.*, the stockholders would have contributed millions of dollars in assets to the failing CFS with a $15,000,000 negative net worth, resulting in

acquisition of a "surviving" thrift that could have been rendered deficient in regulatory capital immediately after merger.

The memo of Vartanian stated:

> According to the preliminary **proxy material filed with the Board**, . . . assuming that Carolina Federal continued to incur additional losses at the same rate, Carolina Federal's net worth will be depleted during the latter part of 1982. . . .There is currently no active trading market for Carolina Federal's shares. (Emphasis added) App.A79-A80.

B. Findings

The Court of Federal Claims made the following specific findings that materially conflict with the excluded evidence:

(1.) "As a part as the merger negotiations, Old NCF sought assurances from the FHLBB and FSLIC in the form of favorable accounting treatment. In particular, Old NCF wanted the ability to count so-called supervisory goodwill, the difference between CFS' purchase price and its fair market value towards its regulatory capital requirements. Old NCF viewed the accounting treatment of supervisory goodwill as a critical factor in the merger's overall success. After approving the accounting treatment for the merger, the FHLBB proceeded with the transaction and allowed Old NCF to record supervisory goodwill as a capital asset on the books of the surviving corporation. The FHLBB, as was usual in *Winstar* cases, also allowed the emerging entity to amortize such goodwill over forty years." (Emphasis added) App.A8.

Conflicting Evidence: "40 years is unacceptable without a detailed analysis." Memo from Deputy Director FHLBB to Robert J. Moore and Harry M. Zimmerman, Associate General Counsel, dated April 20, 1982. App.A48.

(2.) Opinion: "As part of the merger, Old NCF purchased all of CFS's outstanding common stock at a cost of $905,000. Old NCF then merged into CFS, but CFS remained a surviving corporation.

Old NCF shareholders engaged in one-for-one exchange for shares of CFS. CFS adopted Old NCF's charter and bylaws, and changed its name to North Carolina Federal and Loan Association ("New NCF"). The shareholders then met and voted in favor of the merger, thereby ratifying New NCF as the emerging entity." (Emphasis added). App.A9.

Conflicting Evidence: The Plan of Merger in the Application, § 2.3, required first approval by shareholders vote then execution of the documents. App.A80-A81.

(3.) Opinion.: "Critical to the issue of privity of contract, Defendant points to the Smiths lack of participation in the regulatory approval of the Old NCF/CFS merger. Indeed the Smiths are neither mentioned in the relevant documents Old NCF submitted to the FHLBB as part of the merger, nor are they signatory's to these documents...in fact, the only mention of the Smiths, according to Defendant results from the Proxy statement Old NCF issued to them prior to the merger...'nothing in the proxy statement remotely suggests that regulators intended to enter into a contract with either shareholders or the thrift-much less the shareholders.'" (Emphasis added). App.A16.

Conflicting Evidence: Petitioners were included in every reference to "shareholders" of Old NCF. This included conditions concerning voting, transfer of assets to CFS, and acquisition of all shares of the failing CFS by shareholders of Old NCF.

(4.) "The uncontested facts in the record do not indicate the government regulators either intended to negotiate directly with the Smiths, or actually did negotiate directly with the Smiths." (Emphasis added)

Conflicting Evidence: The omitted evidence discloses that FHLBB's offer could be accepted only by vote and action of shareholders of Old NCF and was thus accepted.

(5.) "It is now well-established in this circuit that only parties to an agreement and in the context of Third-Parties, such as

shareholders that usually means signatories, may sue for direct breach of contract." (Emphasis added) App.A18.

Conflicting Evidence: Old NCF shareholders formed a unilateral contract by voting, transferring assets and acquiring Old CFS. General rules of contract law apply. *See Winstar Corp. v. United States*, 64 F.3d 1531 (Fed. Cir. 1995) (*en banc*), *Aff'd* U.S. 116 S.Ct. 2432 (1996).

(6.) "The Smith Plaintiffs' second so-called derivative claim is not at all about the loss of value of NCF shares as they contend, but really about recoupment of their personal $28 (sic) million contribution of the Old NCF/CFS merger. Clearly it is not a derivative claim at all because the $28 (sic) million in shareholder equity represents contributions from individual shareholders. Any claim for loss of investment value belongs solely to these shareholders as individuals not to all shareholders of the corporation or the corporation as a *de jure* entity." App.A24.

Conflicting Evidence: All evidence shows Petitioners have standing as real parties in interest on their own claim and also as representatives on Old NCF's derivative claim. See CFC 17 (a)(b)

(7.) "The Court rejects both of the Smiths takings arguments because the Smiths, as shareholders, simply have no standing to bring a takings claim under the facts of this case. The law of this Circuit is clear: What was taken by the government here was not the thrift or the shares, but the contractual right to use supervisory goodwill as an asset and for amortization of the asset." App.A28.

Conflicting Evidence: The rule of promissory estoppel is recognized by courts of appeal in other circuits. Petitioners had evidence of an alternative claim based on the rule of promissory estoppel and the taking of the property created by that widely recognized rule.

3. The Court of Appeals Decision.

The Court of Appeals summarily affirmed the Trial Court without opinion pursuant to its rule 36. App.A1. That affirmance necessarily affirmed the far reaching error noted above in the questions presented for which review is sought.

REASONS FOR GRANTING THE PETITION

A. The courts below have radically truncated mandatory fairness standards for resolving motions for summary judgment.

The trial court's unauthorized use of a Show Cause Order and its affirmance in the Court of Appeals strongly challenge the continuing validity of an important rule of practice established by this Court. The trial court's procedure also is not sanctioned by Rule 56 of the rules of civil procedure. A denial of review by this Court would clearly signal availability of show cause orders as acceptable alternatives to the more just and wise procedure required by this Court.

The trial court's assumed power to invent the order in question has even now been cited with apparent approval in at least these two later cases: *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 136, 2004 U.S. Claims LEXIS 49 (2004); *Eagle Design & Management v. United States*, 62 Fed. Cl. 106, 108, 2004 U.S. Claims LEXIS 244 (2004).

The Show Cause Order is an invention because "[o]rders to show cause and rules nisi are not provided for in the Federal Rules of Civil Procedure." *5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure* (2d ed. 1990) § 1195.

Improper use of the Show Cause Order vitiates all the trial courts determinations. The *sua sponte* exclusion of Petitioners' evidence presents an important issue. In *Foucha v. Louisiana*, 504 U.S.71, 112 S. Ct. 1780, 1783 (1992), this Court said that "[b]ecause the case presents an important issue and was decided by the court below in a manner arguably at odds with prior decisions of this Court, we granted *certiorari*." In the case at bar an important issue was presented and clearly decided at odds with prior decisions of this

Court regarding the requirement for giving due effect to evidence favorable to non-movant in deciding summary judgment motions.

The Show Cause Order and Opinion conflict with the decisions of this Court governing summary judgment that "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in its favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2513 (1986); Matsushita Elec. Indus. Co. v. Anos Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 1356 (1986); United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993, 994 (1962). In its affirmance of the lower court's repudiation of this Court's rule, the Court of Appeals for the Federal Circuit "has so far departed from the usual course of proceedings, or has so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Supreme Court Rule 10(a)(b). The courts below have *sua sponta* initiated a drastic and potentially far reaching change in the rules of practice and procedure, which should not go unnoticed by this Court.

The Court of Appeals' summary affirmance necessarily affirmed an important change in federal practice that conflicts with decisions of this Court.

Petitioners did not have to sign the contract to make it enforceable. "It is well understood that a contract may be unilateral; that is, that only one party makes a promise. The consideration for the promise is some non-promissory performance rendered by the promisee...." J. Perillo, *Corbin* § 1.19, p. 59 (rev. ed. 1993) "For example, an offer...will become a contract when what is requested is given or done, though no obligation to give or do anything ever exists." 1 *Williston on Contracts* § 1:17 at 45 (4th ed. 1990). Old NCF's shareholders before merger accepted FHLBB's offer and promise of the stipulated supervisory goodwill forbearance by the required vote which transfers Old NCF's assets to CFS, by consummating the merger, and by acquiring CFS's shares. The unilateral contract was thereby completed.

"[C]onsistent with the notion that assent is to [be] judged objectively, the law properly construes both acts and words as having the meaning which a reasonable person present would ascribe

them in view of the surrounding circumstances." 1 Samuel Williston and Richard A. Lord, *A Treatise on the Law of Contracts* (4th ed. 1990), § 4:12. Judged objectively, the shareholders of Old NCF, including Petitioners, reasonably believed FHLBB offered them an agreement in exchange for their vote for transfer of value to CFS, which they completed as specified.

The essence of the terms of the transaction negotiated by FHLBB were to provide regulatory incentives to encourage specifically identified investors to capitalize CFS. The regulators offered specific incentives, negotiated by them, which were intended to, and did, induce the stockholders of Old NCF to assent by their vote and their act in infusing new capital and assuming control of CFS. Petitioners may recover for restoration of the value of net worth passed in a merger, the value of what they gave up. *See Glendale Fed. Bank v. United States*, 239 F.3d 1374, 1380-81 (Fed. Cir. 2001) (discussion of restitution of capital contribution).

B. **As an alternative to privity by contract, Petitioners had standing on their "takings claims."**

Petitioners, as an alternative to contract, alleged claims for the United States' taking of property created by the United States' promises and Petitioners' actions in justifiable reliance. In *Porter v. Commissioner of IRS*, 60 F.2d 673 (2d Cir. 1932), Judge Learned Hand quoted with approval from *Williston on Contract*, § 140, that "'Promissory estoppel is now recognized as a species of consideration.'" In *Allied Equp. Co. v. Weber Eng. Prod.*, 237 F.2d 879, 882 (4th Cir. 1956), the Fourth Circuit recognized the doctrine of promissory estoppel: "On this first question we hold therefore that, if, pursuant to an understanding with Weber, Allied expended sums of money in developing a distributorship system for Weber products throughout Virginia, it was entitled to the right of distributorship".

The Courts finding that "any claim for a loss of investment value belongs solely to the shareholders as individuals..." supports Petitioners claims for a taking. Clearly, Petitioners are the real parties in interest on that claim. The opinion arrives at the novel

conclusion that Petitioners lack privity even in the face of facts showing they are real parties in interest.

The opinion defines privity as "the 'connection or relationship between two parties each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property)...'" Black's Law Dictionary, 1272 (Brian A. Garner ed., West Group 7th ed. 1999) (1933). By the Opinion's own finding, Petitioners rights and interests are inextricably bound up and intertwined with the entirety of the transaction involving CFS, Old NCF, FHLBB, a supervisory-goodwill forbearance, and the issue of who has rights in any recovery. This is "privity."

Promissory estoppel was similarly applied in *Clausen & Sons, Inc. v. Theo. Hamm Brewing Co.*, 395 F. 2d 388 (8th Cir. 1968) (when "promisor should reasonably have expected its promise to induce another's detrimental action"), and in *Allen M. Campbell Co. v. Virginia Metal Indus.*, 708 F.2d 903, 931 (4th Cir. 1983) ("promissory estoppel...allows recovery even in the absence of consideration"). *See also* 1 *Farnsworth on Contracts*, §§ 1.8, 2.19 and 3.2 (2d ed. 1998).

The Court in *Securities Savings & Loan Ass'n v. Director, Office of Thrift Supervision*, 960 F. 2d 1318, 1323 (5th Cir. 1992), a *Winstar*-related case, held: "Like the Sixth and Ninth Circuits, we find that 'if a taking of property rights occurred, 'the evidence of congressional intent is strong enough to infer that Congress wanted to effect a taking.'" The decision of the Court of Appeals in this case conflicts with decisions of other courts of appeals cited above.

CONCLUSION

The petition for a writ of *certiorari* should be granted. The decisions of the Court of Federal Claims and the Court of Appeals conflict with decisions of this Court, with other courts of appeals, and with Article V of the Constitution.

Respectfully submitted,

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